

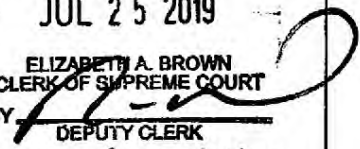
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KODY PATRICK CLOUTIER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 76310-COA

**FILED**

JUL 25 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Kody Patrick Cloutier appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit kidnapping, first-degree kidnapping with use of a deadly weapon, conspiracy to commit robbery, robbery with use of a deadly weapon, battery with use of a deadly weapon resulting in substantial bodily harm, coercion, and assault with a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Charles Geraci was attacked and beaten by Cloutier and three other assailants. After beating and subduing Geraci, the assailants took his backpack containing his laptop computer and his dentures, as well as his wallet and cellphone. Next, Cloutier and his co-conspirators bound Geraci's hands and shoved him into a closet, where he remained for approximately three hours. Subsequently, the assailants removed Geraci from the closet, placed a pillowcase over his head, tied a rope around his neck, and forced him into the trunk of a car.

After driving for a while, the vehicle stopped on Las Vegas Boulevard, near Sloan, Nevada. At gunpoint, Geraci was removed from the trunk and stripped of his clothes, except for his socks and underwear. Cloutier and his co-conspirators then ordered Geraci to run. While he was running, Geraci heard gunshots, which he assumed were directed at him. After running through the desert for approximately a quarter mile in only

his socks and underwear, Geraci stopped, turned around, and noticed that his attackers were driving away. Nevada Highway Patrol troopers arrived at the scene shortly thereafter, followed by officers from the Las Vegas Metropolitan Police.

The State charged Cloutier with conspiracy to commit kidnapping, first degree kidnapping with use of a deadly weapon, conspiracy to commit robbery, robbery with use of a deadly weapon, battery with use of a deadly weapon resulting in substantial bodily harm, coercion, assault with a deadly weapon, and preventing or dissuading a witness or victim from reporting a crime or commencing prosecution. After a four-day trial, the jury returned a guilty verdict on all counts, except preventing or dissuading a witness or victim from reporting a crime or commencing prosecution. The district court sentenced Cloutier to 10 to 28 years in prison.

On appeal, Cloutier argues (1) that there were various instances of prosecutorial misconduct, (2) that the district court erred in not conducting a competency hearing, and (3) that the district court abused its discretion when it permitted a flight instruction to be submitted to the jury.

*Prosecutorial misconduct*

Cloutier argues that the prosecution committed misconduct by (1) alluding to facts not in evidence, (2) misrepresenting the evidence, (3) vouching, (4) implying the jury had a duty to convict, and (5) injecting personal opinion. Because Cloutier did not object below, he has waived all but plain error review. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d

590, 593 (2015) (“[A]ll unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension.”).<sup>1</sup>

“[T]he decision whether to correct a forfeited error is discretionary.” *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018), *cert. denied*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 415, 202 L.Ed.2d 320 (2018). “Before [the] court will correct a forfeited error, an appellant must demonstrate that: (1) there was an ‘error’; (2) the error is ‘plain,’ meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant’s substantial rights.” *Id.* at 50, 412 P.3d at 48. “[A] plain error affects the defendant’s substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a ‘grossly unfair’ outcome).” *Id.* at 51, 412 P.3d at 49. Having reviewed the record, we conclude that Cloutier has failed to meet his burden pursuant to *Jeremias*. Although Cloutier avers numerous claims of misconduct, the misconduct, if any, is not plain or manifest “from a casual inspection of the record.” *Id.* at 50, 412 P.3d at 48. Moreover, the evidence adduced at trial was substantial. For instance, the State presented the jury with, *inter alia*, eyewitness testimony and DNA evidence, as well as additional physical evidence that corroborated the State’s theory of the case, including the bat and two metal pipes that were used beat Geraci. In light of this evidence, Cloutier has

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<sup>1</sup>Although Cloutier’s co-defendant objected at trial regarding two of the complained of errors (misrepresenting the evidence and implying a duty to convict), Cloutier did not. Thus, plain-error review is appropriate for all claims, as the co-defendant’s timely objection does not inure to Cloutier’s benefit. *See Rowland v. State*, 118 Nev. 31, 41, 39 P.3d 114, 120 (2002) (applying plain error review where the co-defendant failed to join an objection or provide his own); *see also* 4 C.J.S. *Appeal and Error* § 313 (2019) (“As a general rule, the objection in the trial court must have been made by the party who urges the error in the appellate court.”).

failed to demonstrate how any of the alleged errors affected his substantial rights by showing actual prejudice or a miscarriage of justice. *See id.* at 50-51, 412 P.3d at 48-49; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (holding “the burden is on the defendant to show actual prejudice or a miscarriage of justice”). Therefore, we conclude that Cloutier has failed to establish plain error.

### *Competency Hearing*

Next, Cloutier argues that the district court erred in failing to hold a formal competency hearing. We disagree.

A district court’s decision to hold a competency hearing is reviewed for an abuse of discretion. *Olivares v. State*, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008). Under NRS 178.400(2)(a), a criminal defendant is incompetent if he does not have (1) the present ability to understand the nature of the criminal charges against him, (2) understand the nature and purpose of the court proceedings, or (3) is not able to aid and assist his counsel in his defense with a reasonable degree of rational understanding. If a doubt arises regarding the defendant’s competency, the district court “shall suspend the proceedings, the trial or the pronouncing of the judgment, as the case may be, until the question of competence is determined.” NRS 178.405(1). Whether such a doubt is raised, however, is within the discretion of the trial court. *Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983). But when there is “substantial evidence that the defendant may not be competent to stand trial,” the district court must hold a formal competency hearing. *Olivares v. State*, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008) (internal quotation marks omitted).

Our review of the record demonstrates that the district court did not abuse its discretion because there was not substantial evidence to



show that Cloutier was incompetent to stand trial. Indeed, there is nothing in record that would call into question Cloutier's competency. Although Cloutier's trial counsel requested additional time to prepare for trial because of his illiteracy and mild learning disability, counsel never argued, or even suggested, to the district court that Cloutier was incompetent. Moreover, the district court granted counsel's request for a continuance, providing her and Cloutier with 20 additional days to prepare for trial. Therefore, on this record, we cannot conclude that the district court abused its discretion.

### *Flight Instruction*

Finally, we consider the flight instruction. Cloutier argues that the district court erred in submitting a flight instruction to the jury because his flight was too remote to be indicative of guilt. We disagree.

We review a district court's decision to give a jury instruction for an abuse of discretion or judicial error. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "[A] district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest." *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). "Flight instructions are valid only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." *Jackson*, 117 Nev. at 121, 17 P.3d at 1001. Because flight instructions are potentially prejudicial, "this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." *Weber v. State*, 121 Nev. 554, 582, 119 P.3d 107, 126 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017).

Here, the record suggests that Cloutier fled from law enforcement agents in a deliberate attempt to evade apprehension for the instant crimes. Specifically, Cloutier actively evaded officers from a criminal apprehension team, including marked K-9 units, as they attempted to apprehend him pursuant to a lawful arrest warrant. Moreover, Cloutier's argument that his flight was too remote in time from the crimes to be probative finds little support in our jurisprudence. Although it is true that Cloutier's flight occurred several months after the crimes were committed, he fails to point to any binding authority that demands there be a temporal proximity between the crime charged and the defendant's flight, especially where only months have passed since the crimes were committed and he has not been charged with any other offenses. Indeed, our case law is contrary to Cloutier's contention that the remoteness of flight tends to completely dilute its probative value. *See, e.g., Jackson*, 117 Nev. at 121, 17 P.3d at 1001 (approving a flight instruction where defendant's change of appearance was made several months after the robbery was committed). Thus, the district court acted within its discretion to give the instruction because "the record supports the conclusion that [Cloutier] fled with consciousness of guilt and to evade arrest." *Rosky*, 121 Nev. at 199, 111 P.3d at 699-700.


Nevertheless, even if the district court did err in issuing the flight instruction, the error was harmless. First, the jury instruction was self-curing as it stated, "[t]he flight of person after the commission of a crime is *not sufficient* in itself to *establish guilt* . . . [and] [t]he weight to which such circumstance is entitled is a *matter for the jury to determine*." (Emphasis added.) Thus, the jury instruction simply informed the jurors that flight may be considered when assessing guilt. Second, Cloutier does not

explain how the averred error resulted in prejudice. *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (explaining that non-constitutional error is harmless unless it had a substantial and injurious effect on the jury's verdict). And finally, as discussed *supra*, the evidence adduced at trial was more than sufficient to sustain the conviction. Therefore, the error, if any, was harmless because it did not have a "substantial and injurious effect or influence [on] the jury's verdict." *Tavares*, 117 Nev. at 732, 30 P.3d at 1132 (internal quotation marks omitted).

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Michelle Leavitt, District Judge  
Brian S. Rutledge  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk